Supreme Court, U.S.
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No.

In the Supreme Court of the United States

THOMAS WILNER, ET AL., PETITIONERS
v.
NATIONAL SECURITY AGENCY
AND DEPARTMENT OF JUSTICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an action seeking agency records under the Freedom of Information Act, may a court uphold an agency's invocation of the "*Glomar*" doctrine—thereby allowing the agency to avoid confirming or denying the existence of records in order to keep secret aspects of an agency program—where the Executive Branch has officially acknowledged the existence and contours of the program, and where records, if they exist, necessarily evidence agency conduct that is illegal and unconstitutional?

PARTIES TO THE PROCEEDINGS

The following parties, all individuals, were plaintiffs in the district court and appellants in the court of appeals, and are petitioners in this Court: Thomas Wilner, Gitanjali S. Gutierrez, Michael J. Sternhell, Joshua Colangelo Bryan, Brian J. Neff, Joseph Margulies, Scott S. Barker, James E. Dorsey, Asmah Tareen, Richard A. Grigg, Thomas R. Johnson, George Brent Mickum IV, Stephen M. Truitt, Jonathan Hafetz, Jonathan Wells Dixon, Tina M. Foster, Alison Sclater, Marc D. Falkoff, David H. Remes, H. Candace Gorman, Charles Carpenter, John A. Chandler, Clive Stafford Smith.

The following parties, each a governmental agency, were defendants in the district court and appellees in the court of appeals, and are respondents in this Court: National Security Agency and Department of Justice.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a) is reported at 592 F.3d 60 (2d Cir. 2009). The opinion of the district court granting summary judgment on the *Glomar* claims (App. 33a-49a) is unreported and is available at 2008 WL 2567765, 2008 U.S. Dist. LEXIS 48750 (S.D.N.Y. June 25, 2008). The district court's opinion and order entering final judgment as to the *Glomar* issues pursuant to Federal Rule of Civil Procedure 54(b) (App. 50a-53a) is unreported and is available at 2008 WL 2949325, 2008 U.S. Dist. LEXIS 58095 (S.D.N.Y. July 31, 2008).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Freedom of Information Act Exemption 1 provides in pertinent part for the nondisclosure of records relating to matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Freedom of Information Act Exemption 3, at the time this suit was filed, provided in pertinent part for nondisclosure of records relating to matters that are "specifically exempted from disclosure by statute ... provided that such statute (A) requires that the matters be withheld from the public

in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* § 552(b)(3), amended by Pub. L. No. 111-83, § 564(b), 123 Stat. 2142, 2184 (Oct. 28, 2009).[1] The relevant statutory provisions are reprinted in the Appendix. (App. 54a-57a)

STATEMENT

Thomas B. Wilner, Esq., a former partner at Shearman and Sterling LLP, and the twenty-two other petitioners are lawyers who are representing or have represented Guantánamo detainees. Petitioners brought this Freedom of Information Act ("FOIA") case to obtain records showing whether the National Security Agency ("NSA") has engaged in warrantless surveillance of their electronic communications. The possibility that the NSA has targeted these lawyers for surveillance has made them reluctant and, in some cases, unable to engage in communications via telephone, e-mail, and facsimile. The threat of surveillance has obstructed their access to witnesses and other sources of evidence, and undermined their representation of their clients.

Petitioners' fear of surveillance is well-grounded. High-level Administration officials have acknowledged that the NSA engaged in warrantless interception of electronic communications of individuals alleged to have

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[1] The current version of Exemption 3 reads "specifically exempted from disclosure by statute (other than section 552b of this title), if that statute— (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [which was enacted on Oct. 28, 2009], specifically cites to this paragraph." The amendments are immaterial to the matters at issue in this petition.

connections to terrorist organizations *and* that the Guantánamo detainees' lawyers may have been targeted. The NSA and the Department of Justice ("DOJ") have argued that the zone of privacy that ordinarily safeguards the attorney-client relationship does not apply to Guantánamo detainees and their lawyers, and the executive maintained that it has a legal right to eavesdrop on lawyers without judicial oversight.

A. Factual Background

In the aftermath of the terrorist attacks of September 11, 2001, hundreds of men were detained by the Department of Defense and the Central Intelligence Agency ("CIA") at the U.S. Naval Base at Guantánamo Bay, Cuba. Nearly six hundred detainees have since been released or transferred without being formally charged. Many of the remaining detainees have filed and are actively litigating habeas corpus petitions challenging their detention. Detainees have prevailed in 34 of the 46 cases decided on the merits to date.[2]

Petitioners currently represent or have represented Guantánamo detainees in habeas challenges. These lawyers are partners and associates at prominent law firms, law professors, and attorneys for established nonprofit organizations who also represent individual and corporate clients with no relation to Guantánamo. Petitioners began representing detainees only after the Federal Bureau of Investigation ("FBI") conducted an extensive security clearance review and deemed them to pose no threat to national security. *See, e.g.*, Gutierrez Decl. ¶ 39,

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[2] *See* Charlie Savage, *Obama Team is Divided on Anti-Terror Tactics*, N.Y. Times (Mar. 28, 2010), *available at* http://www.nytimes.com/2010/03/29/us/politics/29force.html?hp=&pagewanted=all (last visited Mar. 29, 2010).

App. 77a; Chandler Decl. ¶ 8, App. 94a-95a; Gorman Decl. ¶ 14, App. 852a.

On December 17, 2005, after extensive disclosures in the media, President Bush confirmed that he had approved a warrantless surveillance program, the Terrorist Surveillance Program ("TSP" or "NSA Program"), conducted by the NSA in the wake of September 11th.[3] Notwithstanding the explicit command of the Fourth Amendment, and Congress's enactment of the Foreign Intelligence Surveillance Act ("FISA"), the NSA did not seek judicial approval for its surveillance activities under the TSP,[4] and, from 2001 to 2007, President Bush reauthorized the TSP more than 30 times.[5] Once the President acknowledged the TSP's existence, the Executive Branch engaged in an extensive media campaign to describe the program's scope and to defend its legitimacy.[6]

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[3] President George W. Bush, Radio Address (Dec. 17, 2005) ("*Bush Radio Address*") transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html (last visited Mar. 30, 2010).

[4] *Id.*

[5] President George W. Bush, News Conference (Dec. 19, 2005) ("*Bush Press Conference*") *transcript available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-2.html (last visited Mar. 30, 2010). Attorney General Gonzales announced the suspension of the program in 2007, while the President maintained the continued threat of surveillance by reserving the right to reinstitute it without notice. Attorney General Gonzales Ltr. to Senate Committee on Judiciary (Jan. 17, 2007), *available at* http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf (last visited Mar. 30, 2010).

[6] President George W. Bush, *Remarks on the War on Terror* (Sept. 5, 2006) *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/05/AR2006090500656.html (last visited Mar. 30, 2010); Vice President Richard Cheney, *Commencement Address at the United States Naval Academy* (May 26, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052601166.html (last visited Mar. 30, 2010); Attorney

NSA Director General Michael V. Hayden, Attorney General Alberto Gonzales, and many other senior Administration officials publicly described and defended the program.[7]

Senior officials conceded that the standards the NSA employed for approval of surveillance under the TSP were less rigorous than the procedures required by FISA. Under FISA, the NSA must obtain judicial approval for any and all electronic surveillance for foreign intelligence and must employ mitigation procedures when the intercept might involve U.S. persons and privileged information.[8] Attorney General Gonzales acknowledged that the surveillance carried out by the TSP was within the defined field of "electronic surveillance" regulated by FISA.[9] Nonetheless, the TSP was used "in lieu

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General Alberto Gonzales, *Ask the White House* (Jan. 25, 2006) ("*Gonzales Ask the White House*") *available at* http://www.whitehouse.gov/ask/20060125.html (last visited Dec. 3, 2008); Transcript of Attorney General Alberto Gonzales' Morning Show Interviews (Dec. 19, 2005), *available at* http://www.usdoj.gov/ag/readingroom/surveillance2.pdf (last visited Mar. 30, 2010).

[7] General Michael V. Hayden, Press Briefing by Attorney General Alberto Gonzales and General Michael V. Hayden (Dec. 19, 2005) ("*Gonzales/Hayden Press Briefing*"), *available at* http://www.fas.org/irp/news/2005/12/ag121905.html (last visited Mar. 30, 2010); *see also* U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("*DOJ White Paper*") *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (last visited Mar. 30, 2010).

[8] General Michael V. Hayden, *What American Intelligence & Especially the NSA Have Been Doing To Defend the Nation*, Address to the National Press Club (Jan. 23, 2006) ("*Hayden Address to the Nat'l Press Club*"), *available at* http://www.fas.org/irp/news/2006/01/hayden012306.pdf (last visited Mar. 30, 2010); *see also Gonzales/Hayden Press Briefing*, *supra* note 7.

[9] See *Gonzales/Hayden Press Briefing*, *supra* note 7 ("Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act

of" the procedures specified under FISA.[10] Under the TSP, an NSA shift supervisor selected and approved the individuals whose communications were intercepted; neither the President nor the Attorney General, nor anyone in DOJ reviewed the specific target selections or the nature of the communications to be intercepted.[11]

Official announcements made clear that the TSP likely included the surveillance of Guantánamo lawyers. As described by senior members of the Bush Administration, the TSP allows monitoring of any electronic communications when one party is outside the United States and one party is suspected of being "link[ed]" to or "associated" with al Qaeda or "related terrorist organizations."[12] DOJ confirmed the details of the NSA surveillance program in a 42-page White Paper, issued on January 19, 2006, which attempted to justify the program's legality.[13] As the Ninth Circuit explained in *Al-Haramain*, "[t]hat the Department of Justice even thought it necessary to explain to the public 'in an unclassified form, the legal basis for the NSA activities described by the President,' ... suggests that the government both knew that details of the surveillance program were in the public sphere and recognized that the Surveillance Program was already the subject of significant public discussion and interest." *Al-Haramain Islamic*

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provides—requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday").

[10] *Id.* (quoting Michael Hayden).

[11] *Gonzales/Hayden Press Briefing*, *supra* note 7.

[12] *Bush Press Conference*, *supra* note 5; *Gonzales Ask the White House*, *supra* note 6. Hayden also acknowledged that, although the NSA surveillance program targets communications where one party is outside the United States, if a purely domestic call were intercepted, that "incident ... would be recorded and reported." *Hayden Address to the Nat'l Press Club*, supra note 8.

[13] *DOJ White Paper*, *supra* note 7.

Found., Inc. v. Bush, 507 F.3d 1190, 1199-1200 (9th Cir. 2007) (quoting *DOJ White Paper*, *supra* note 7, at 1).

The Executive Branch has officially acknowledged (in a submission to Congress) that attorneys are not categorically excluded from these definitions of surveillance targets under the NSA Program,[14] and has argued that it has a right to target them. Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, at A14. Although Executive agencies refuse to officially confirm whether they have actually eavesdropped on lawyers, Transcript of Proceedings, *Al-Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, CV-07-1155, at 31 (D. Or. Apr. 14, 2008) ("*Al-Haramain* Transcript"), published opinions from federal courts have adverted to the possibility that attorneys were subject to surveillance. *See, e.g.*, *Al-Haramain*, 507 F.3d at 1193. In the *Al-Haramain* case, the Treasury Department inadvertently sent an attorney summaries of phone calls between her law firm's attorneys and their client, a charity in Saudi Arabia, which the plaintiffs in that case allege demonstrates that attorney-client conversations had been intercepted and recorded. Patrick Radden Keefe, *State Secrets: A Government Misstep in a Wiretapping Case*, THE NEW YORKER, Apr. 28, 2008, at 28.

Lawyers for the Guantánamo detainees fit the officially-acknowledged profile of those subject to surveillance under the TSP. The Administration announced that the program targeted people "with known links to al Qaeda and related terrorist organizations,"[15] and peti-

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[14] Assistant Attorney General William E. Moschella, *Responses to Joint Questions from House Judiciary Committee Minority Members* (Mar. 24, 2006) ("*Moschella Ltr.*"), ¶ 45, *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf (last visited Mar. 30, 2010).

[15] *See Bush Radio Address*, *supra* note 3.

tioners *represent* the Guantánamo detainees whom the government describes as suspected "terrorists" and "enemy combatants." Government officials have twice informed Thomas Wilner that he is "probably the subject of government surveillance." Wilner Decl. ¶ 5, App. 98a.

The widespread acknowledgement that Guantánamo attorneys are possible targets of surveillance has caused "many prominent criminal defense lawyers [to] say [there] is a well-founded fear that all of their contacts are being monitored by the United States government." Shenon, *supra*, at A14. Instead of quelling attorneys' concerns, the Executive Branch fueled the perception that the concerns are grounded in fact. According to *The New York Times*, "The Justice Department does not deny that the government has monitored phone calls and e-mail exchanges between lawyers and their clients as part of its terrorism investigations in the United States and overseas." *Id.* The *Times* reports that "[t]wo senior Justice Department officials" admitted that "they knew of ... a handful of terrorism cases ... in which the government might have monitored lawyer-client conversations." *Id.*

The looming threat of surveillance, unsupervised by the courts and not subject to judicially-monitored minimization to protect privileged communications, has chilled the petitioners' representation of clients. The likelihood of NSA interception of petitioners' telephone calls, e-mails, and facsimile transmissions has undermined their ability to engage in candid communications necessary to obtain evidence and investigate their clients' cases. *See, e.g.*, Chandler Decl. ¶ 5, App. 92a-93a; Dixon Decl. ¶ 20, App. 107a; Gutierrez Decl. ¶¶ 24-25, App. 74a; Wilner Decl. ¶ 8, App. 99a-100a. Official announcements of the TSP have put persons outside the U.S. on notice that conversations with petitioners may be recorded by the NSA. Many such persons reasonably

fear that intercepted information could be used against their detained family members. As a result, petitioners have struggled to obtain information from witnesses who no longer speak freely, and some witnesses are no longer willing to speak with petitioners at all. *See, e.g.*, Chandler Decl. ¶ 5, App. 92a-93a; Gutierrez Decl. ¶ 24, App. 74a.

The threat of surveillance also has interfered with petitioners' representation of their non-detainee clients: individuals, governments, and entities wholly unrelated to Guantánamo. Lawyers typically rely on electronic channels to communicate with foreign clients, but, as petitioner Thomas Wilner explains, "[n]o one in good conscience can freely identify or discuss possible plans for a case while the other side may be listening in. Because of the possibility that the government is monitoring my communications, I regularly refrain from discussing in my phone calls and emails with my foreign clients key issues that should be discussed to protect their interests." Wilner Decl. ¶ 8, App. 99a-100a. Because she could not ensure that her communications were confidential, petitioner H. Candace Gorman first stopped accepting new clients and eventually took a leave of absence from her litigation practice. Gorman Decl. ¶¶ 18, 20, 22, App. 87a-89a. Petitioner Gitanjali Gutierrez explains that for almost a year she was unable to obtain information critical to her client's enemy combatant status determination because she could not assure herself or her client's family that their telephone or e-mail communications would be confidential. Gutierrez Decl. ¶ 24, App. 74a; *see also* Dixon Decl. ¶ 20, App. 107a.

B. Procedural Background

Petitioners, in letters to the NSA and DOJ dated January 18, 2006, requested pursuant to FOIA several categories of records, only the first of which is relevant

here: "records obtained or relating to ongoing or completed warrantless electronic surveillance or physical searches regarding, referencing or concerning any of the plaintiffs."[16] The agencies refused to confirm or deny whether they possessed records responsive to this request.

Petitioners consequently filed a complaint against both the NSA and the DOJ in the United States District Court for the Southern District of New York on May 17, 2007. (The basis for federal jurisdiction in the district court was 5 U.S.C. § 552(a)(4)(B).) With the agreement of the parties, the district court bifurcated the case into two separate tracks. The first track concerned the NSA and DOJ's *Glomar* response to petitioners' request for records reflecting whether they had been subject to surveillance under the TSP. (The second track, not at issue in the subsequent appeal or this petition, addressed the NSA and DOJ's assertion of FOIA exemptions in response to petitioners' other requests.) After the bifurcation of the *Glomar* and non-*Glomar* issues, the NSA and DOJ filed a Motion for Partial Summary Judgment on the *Glomar* issue, which petitioners opposed. The district court granted the Motion for Partial Summary Judgment on the *Glomar* issue on June 25, 2008. App. 33a-49a.

In its ruling, the district court began by accepting the *Glomar* framework and noting that the "[d]efendants need only proffer one legitimate basis for invoking the Glomar Response in order to succeed on their motion for summary judgment." App. 40a. Although the NSA and DOJ had argued that responsive records, if they existed, would be subject to withholding under both Exemption 1 and Exemption 3, the district court focused only on Ex-

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[16] The relevant portions of the request are reproduced in the Amended Complaint, ¶ 8, App. 61a.

emption 3. The claim was based on section 6 of the National Security Agency Act of 1959 ("NSAA"), which shields from public disclosure "any function" or "information with respect to the activities" of the National Security Agency, *see* 50 U.S.C. § 402, App. 56a, and the Act's direction that the agency "protect intelligence sources and methods from unauthorized disclosure." *See* 50 U.S.C. § 403-1(i)(1). App. 56a.

Relying on declarations submitted by the NSA and DOJ, the district court ruled that the disclosure of the records sought by petitioners might divulge NSA's intelligence-gathering capabilities and intelligence sources. Although the court acknowledged petitioners' argument that FOIA cannot be invoked to conceal illegal activity and that the TSP is unconstitutional and violates FISA, the court determined that it "need not address plaintiffs' substantive arguments concerning the TSP's legality because the language of Exemption 3 and Section 6 of the NSAA makes clear that the defendants may permissibly refuse to disclose the information requested by the plaintiffs." App. 44a. In so ruling, the district court did not mention, let alone address, petitioners' main argument that warrantless surveillance of *lawyers* raises legal questions separate and apart from the more general questions about the TSP's legality. Nor did the district court address the consequence of a ruling that gives the NSA free rein to conceal evidence of its own illegal or unconstitutional conduct.

Petitioners filed a notice of appeal on September 24, 2008 from the district court's judgment. The matter was argued on October 9, 2009. At oral argument, the Government refused to make any argument in defense of the legality of the NSA Program, stating "[w]e take no position on the merits of the [legality of the] TSP."

The court of appeals issued both its opinion and judgment affirming the judgment of the district court on

December 30, 2009. Because the Court of Appeals for the Second Circuit had never recognized the availability of the *Glomar* response prior to this ruling, the court first proceeded with an analysis of the doctrine as recognized in several other circuits, ultimately concluding along with them that "'an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a[] FOIA exception,'" but cautioning that a proper invocation of the *Glomar* doctrine must be "'tether[ed]' ... to one of the nine FOIA exemptions." App. 10a-11a. The court only considered the applicability of Exemption 3, adopting the district court's analysis in full in finding that section 6 of the NSAA was a statute exempting the records at issue here from disclosure. The court of appeals further concluded that while the withholding agency nominally bears the burden to show that the invoked FOIA exemption precludes even confirming or denying the existence of records, in this case that burden is limited because section 6 broadly "exempts from disclosure *any* 'information with respect to the activities' of" the NSA. App. 24a (emphasis added). The court of appeals rejected petitioners' suggestion of *ex parte in camera* review of the responsive records or indeed of "any classified materials the agency might present in justification of its response." App. 26a.

Finally, the court of appeals found the question of whether the NSA Program was illegal to be "beyond the scope of this FOIA action" and declined to address it in any way, beyond noting that at oral argument the government stated its intention to continue to assert state secrets privilege in several pending non-FOIA cases

challenging the legality of the Program. App. 28a-29a, 28a n.8.[17]

REASONS FOR GRANTING THE PETITION

At issue in this case is whether lower courts may sanction an agency invocation of the *Glomar* doctrine to conceal patently illegal conduct. Indeed, the NSA Program's illegality is so well acknowledged that the Government refused to defend its legality in the court of appeals. That illegal conduct should be of particular concern to this Court because of its corrosive effect on legal challenges to other illegal behavior of the executive branch. Petitioners here are attorneys who have spent years vindicating the public and private interests in representation of individuals held in unlawful indefinite detention. They have done so in the face of concerted efforts by the government to interfere with that representation. This suit was brought as an attempt to remedy some of the damage the NSA Program did to that representation in the face of numerous warning signs that petitioners may have been subject to surveillance under it. Instead of resolving whether these attor-

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[17] The court of appeals opinion is incorrect to state that petitioners agreed the court "need not reach the legality" of the NSA Program "*because* that question is beyond the scope of this FOIA action" as a whole. App. 28a (emphasis added). As petitioners made clear, "the question for the Court is whether the district court erred in concluding that illegality is *irrelevant* because the FOIA exemptions invoked by the government apply *even if* the surveillance was illegal." Reply Br. of Appellants at 1. While the court of appeals need not have resolved that the NSA Program was illegal before remanding, the question of the NSA Program's illegality would not have been irrelevant to the case on remand. Of course, notwithstanding the government's refusal to take a position on its legality below, the NSA Program was patently illegal and unconstitutional for the reasons noted above.

neys have been subject to such surveillance, the government claims that it is free to keep them guessing. The court of appeals agreed.

In so ruling, the Second Circuit relied for the first time on the *Glomar* doctrine—a narrow, judicially-created exception to FOIA's general mandate in favor of disclosure. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Several other circuits have accepted *Glomar* claims permitting agencies to refuse to confirm or deny the existence of records. But they have done so when, and only when, three conditions have been met: (1) the records relate to a *secret* program the existence of which is properly classified pursuant to an Executive Order, or to the NSA's intelligence-gathering activities or intelligence sources or methods; (2) FOIA's national security exemptions are found to apply to the withheld records—assuming that they exist—so the court is assured that application of *Glomar* will not authorize the withholding of non-exempt records; and (3) the government is not invoking *Glomar* to conceal activities that violate the Constitution or are otherwise illegal. The Second Circuit's acceptance of the agencies' *Glomar* claim in this case exceeded these limits recognized by the other circuits.

Extensive detail about the NSA Program has been officially acknowledged by the President of the United States, the Attorney General, and the National Security Advisor. Senior Executive Branch officials have confirmed not only the program's existence, but also details about the program's operations, including the criteria used to target individuals for surveillance. *See* Statement, *supra*, at 5-7; *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1198 (9th Cir. 2007) ("government officials have made voluntary disclosure after voluntary disclosure about the TSP"). Requiring the NSA and DOJ to disclose whether the petitioners have been targeted

cannot jeopardize this publicly-acknowledged and since-terminated program.

If records of surveillance of the petitioners exist, neither of the FOIA exemptions claimed will justify their concealment, as Exemptions 1 and 3 may not be invoked to hide illegal conduct. *See* Exec. Order No. 13,292 § 1.7(a)(1), 68 Fed. Reg. 15318 (Mar. 28, 2003) ("In no case shall information be classified in order to ... conceal violations of law..."); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 n.49 (D.C. Cir. 1979); *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1389 (D.C. Cir. 1979). Courts have not approved the invocation of FOIA Exemption 3 to conceal illegal or unconstitutional activities. *Terkel v. At&T*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006); *ACLU v. DoD*, 389 F. Supp. 2d 547, 564-65 (S.D.N.Y. 2005); *cf. People for the American Way Found. v. NSA*, 462 F. Supp. 2d 21, 30-31, 33 (D.D.C. 2006); *Navasky v. CIA*, 499 F. Supp. 269, 272-74 (S.D.N.Y. 1980). Exemption 3, relied upon by the court of appeals below, shields documents "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). "[W]here [an NSA] function or activity is authorized by statute *and not otherwise unlawful*, NSA materials integrally related to that function or activity fall within ... Exemption 3." *Hayden*, 608 F.2d at 1389 (emphasis added). However, "NSA would have no protectable interest in suppressing information [under Exemption 3] simply because its release might uncloak an illegal operation...." *Founding Church of Scientology*, 610 F.2d at 830 n.49. The court of appeals' ruling that the NSA may withhold records *even if* they reveal illegal conduct cannot be reconciled with precedent or harmonized with FISA.[18]

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[18] The court of appeals erred in holding that the illegality of the NSA Program was irrelevant to the question of whether Section 6 of the NSA Act would have allowed application of the *Glomar* doctrine recognized by other circuits to the records sought here. App. 24a,

The court of appeals failed to engage with petitioners' main argument—that the *Glomar* doctrine recognized by other circuits may not be invoked to conceal illegal and unconstitutional conduct. If the NSA targeted the Guantánamo lawyers for warrantless surveillance as potential "sources" of intelligence, the constitutional intrusions would be so grave and pervasive that they would be difficult even to catalogue. Such warrantless eavesdropping would not only violate the FISA statute and the Fourth Amendment, but it would also infringe on petitioners' First and Fifth Amendment rights, as well as

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27a-28a. Properly read, Section 6 directs non-disclosure only of information relating to those "functions" and "activities" of the agency that are *authorized* by the Act. An agency has no authority to act outside of the scope of the powers delegated to it by Congress. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (explaining that an agency may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). The same is true with respect to the NSA's duty to protect "intelligence sources and methods." Properly read, that provision safeguards "intelligence sources and methods" obtained in a manner consistent with the Constitution and laws of the United States.

The court of appeals appears to have reasoned that FOIA plaintiffs must show that an agency asserting a *Glomar* response "was acting *for the purpose of* concealing illegal or unconstitutional actions" before considering the illegality of the underlying action as a factor in rejecting the *Glomar* defense. App. 24a-25a (emphasis added). That holding would effectively rewrite the statute to read "intelligence sources and methods, *even if the intelligence was obtained by means that are unauthorized, illegal or unconstitutional.*" That reading cannot be sustained. Although this Court in *CIA v. Sims*, 471 U.S. 159 (1985) read the term "intelligence sources and methods" broadly, it nowhere suggested that Congress authorized (or could authorize) the NSA to dispense with the requirements of applicable law in gathering intelligence from "sources" or "methods."

the detainees' due process rights and privilege of habeas corpus.

FISA regulates all electronic surveillance conducted for foreign intelligence purposes and sets out "the *exclusive* means by which electronic surveillance ... and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). As the NSA recognized, the FISA Court would never have authorized blanket wiretapping of attorneys engaged in litigation against the federal government such as petitioners here—for a multitude of reasons. *See* Statement, *supra*, at 5-6. FISA would prevent the NSA from targeting petitioners' communications unless the NSA procured a warrant under judicial supervision and followed minimization procedures to protect attorney-client privilege.[19] At the threshold, the

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[19] The FISA statute mandates that minimization measures be implemented in every FISC order. *See* 50 U.S.C. § 1801(h) (defining required "minimization" procedures); § 1804(a)(5) (application must set forth "proposed minimization procedures"); § 1805(a)(4) (minimization procedures in any FISA order must meet requirements of § 1801(h)); *see also id.* § 1806(a) ("[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); 18 U.S.C. § 2518(5) (equivalent for Title III). These statutory minimization provisions were created by Congress to implement the *constitutional* particularity requirement for wiretapping warrants. *See Berger v. United States*, 388 U.S. 41, 55-60 (1967) (setting forth constitutional concerns underlying modern minimization requirement); *United States v. Daly*, 535 F.2d 434, 440 (8th Cir. 1976) (Title III minimization provision "was passed by Congress in order to comply with the constitutional mandate ... that wiretapping must be conducted with particularity."); *see also United States v. Scott*, 436 U.S. 128, 135-39 (1978) (conflating Fourth Amendment and statutory standards for minimization). Minimization requirements include a duty to institute procedures to protect the confidentiality of privileged communications. *See, e.g., United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974) (minimization requirement met where

NSA would have failed to meet the probable cause, minimization, and procedural hurdles the statute imposes. *See id.* § 1805(a)(1)-(5). Under FISA, the Executive may not target a "United States person" unless he or she is a "foreign power" or an "agent of a foreign power." § 1804(a)(3)(A). However, "[n]o United States person may be considered a foreign power or an agent of a foreign power *solely upon* the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(2)(A) (emphasis added). Any FISA application directed against these attorney-petitioners based on their associations with clients and witnesses—which are acceptable criteria for targeting under the TSP—would have collided with this injunction, which Congress included expressly to prevent a repeat of the intelligence agencies' history of targeting American citizens for their political activities. 50 U.S.C. § 1805(a)(2)(A). Association for the purposes of advocacy on behalf of "unpopular persons" is "core" First Amendment activity. *See, e.g., In re Primus*, 436 U.S. 412, 427-28, 432-33 (1978); *NAACP v. Button*, 371 U.S. 417, 430-31 (1963); *NAACP v. Alabama, ex rel. Patter-*

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officers instructed not to monitor, record or spot-check privileged conversations, and where "none of the approximately 50 privileged conversations were either monitored, recorded or spot-checked"); *United States v. Bynum*, 485 F.2d 490, 501 (2d Cir. 1973) (minimization met where "monitoring agents were specifically instructed not to intercept privileged conversations" and "no serious argument is made here that privileged calls were intercepted"), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. DePalma*, 461 F. Supp. 800, 818-19 (S.D.N.Y. 1978) (procedures in place to minimize interception of privileged calls, including daily review of surveillance logs by supervisory agents and review once every five days by judges). By definition, any surveillance compliant with any valid orders lawfully issued by the FISA court must be implemented with *judicially-supervised* minimization in place.

son, 357 U.S. 449, 460 (1958). Moreover, the government scrutinized petitioners' individual backgrounds and found they posed no security risk in the course of investigating them for the security clearances required to litigate Guantánamo cases, which further undermines any suggestion that the lawyers themselves could be legitimate targets for surveillance. *See* Statement, *supra*, at 8-9 (citing petitioners' declarations).

Warrantless eavesdropping on the Guantánamo lawyers would also constitute an affront to the judiciary. Targeting counsel for surveillance—indeed, the mere threat of targeting them—chills their communications, significantly impeding the gathering of evidence and presentation of arguments to courts. Interference with lawyers' representation undermines the adversarial process, subverts fundamental notions of separation of powers, and cripples the ability of the judiciary to fulfill its constitutional mandate. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 177 (1803)). *Glomar* may not be invoked as a shield to conceal records demonstrating illegality of the sort that threatens to undermine the judicial function within our constitutional structure.

The court of appeals failed to recognize that *Glomar*, a judicially-created exemption to FOIA, must—if it is recognized at all—be narrowly construed and sparingly applied, lest it become a catch-all "Tenth Exemption" for intelligence records. In this case, the court of appeals applied *Glomar* in a manner inconsistent with the doctrine as recognized in the other circuits and at odds with Congress' pro-disclosure mandate as expressed in FOIA.

Congress enacted FOIA in order to shine light on the actions of federal agencies—to enable citizens, as this Court has stated, to know what their government is "up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omit-

ted). A key role of FOIA is to empower citizens to unearth illegal conduct exactly like that which may have occurred here. *See ACLU v. DoD*, 543 F.3d 59, 66 (2d Cir. 2008) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). FOIA "accords" "special importance" "to information revealing government misconduct.... The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *ACLU v. DoD*, 543 F.3d at 87 (internal citation omitted); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)) (FOIA was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."). In ruling that the legality of the NSA's conduct was irrelevant to FOIA analysis, the lower courts impermissibly shortchanged FOIA's goal of rendering the political branches accountable to the electorate.

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For these reasons, petitioners seek to have the judgment below reversed and this case remanded for further proceedings as to the validity of the underlying exemption claims. The further proceedings petitioners envisage would not pose any harm to the national security. Given the fact that the government has already claimed the right to eavesdrop on lawyers *and* that it has the technical capacity to do so, disclosure of the fact that these lawyers were subject to surveillance could not possibly harm the NSA's intelligence-gathering function. To be sure, there may be *records* responsive to petitioners' request that contain sensitive information. But rejecting a *Glomar* defense simply sets the stage for normal FOIA litigation to proceed. On remand, the agencies would have to set forth their exemption claims and submit declarations to the district court (*in camera*, if necessary) establishing that the records are properly withheld. *See*

5 U.S.C. § 552(a)(4)(B); *see also Patterson v. FBI*, 893 F.2d 595, 599 (3d Cir. 1990) (concluding *sua sponte* that *in camera* inspection of certain documents was necessary to ascertain whether the FBI conducted its investigation in good faith, complied with all relevant government regulations, and engaged in illegal conduct). The agencies will claim, as they have throughout, that the records are exempt under Exemption 1 and Exemption 3. The district court will then consider the merits of those claims. Of course, it is doubtful that the agencies could sustain either of their exemption claims for all of the withheld records, given that warrantless surveillance of these attorney petitioners would be illegal, and thus, while records relating to NSA's surveillance capabilities and other targeting decisions might be properly withheld under Exemption 1 or Exemption 3, records relating to whether petitioners were targeted may not.

The narrowness of the question before the Court bears particular emphasis. As discussed above, the government has publicly disclosed the existence of, and many of the details of, its warrantless surveillance program. The *only* additional information sought by petitioners is whether the government has illegally intercepted *their* communications. Admitting or denying this would not reveal the identities of parties to the communications other than their own. Nor would it reveal sources or methods. Nothing in the *Glomar* doctrine recognized by the other circuits, or the policies behind it, authorizes the government to conceal that information.

* * *

Meaningful judicial review is especially important here, where the claim is that one of our nation's intelligence agencies has exceeded its authority and engaged in illegal domestic surveillance. Congress has recognized that the NSA and CIA have a history of abuses when not checked by judicial oversight. FISA was enacted in re-

sponse to such excesses, and to put an end, once and for all, to unauthorized surveillance by the NSA and CIA. The decision of the court of appeals runs directly counter to Congress' judgment on that score.

To summarize a complicated history, in 1976 Congress released the Church Committee Report detailing "a massive record of intelligence abuses" by the NSA and other intelligence agencies. *In re NSA Telecommunications Litig.*, 564 F. Supp. 2d at 1115-17 (citing S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities ("Church Comm. Rep."), Book II: Intelligence Committees and the Rights of Americans, S. Rep. No. 94- 755 ("Book II"), at 290). The Report revealed that, using "intrusive techniques—ranging from simple theft to sophisticated electronic surveillance—the Government ha[d] collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans." *Id.* The NSA and other agencies had spied on Americans in the name of national security with no judicial oversight. Book II at 21; *see also The National Security Agency and Fourth Amendment Rights*: Hearing on S. Res. 21 Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Agencies, 94th Cong. (1975).

Two examples of NSA operations that went too far should suffice. Under "Operation Shamrock," "the largest governmental interception program affecting Americans" in the Cold War, the NSA intercepted *all* international telegrams sent to or from the United States. Church Comm. Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, at 740. Later on, in the 1960s and 70s, the NSA intercepted communications of individuals and groups put on "watch lists" for "involve[ment] in antiwar and civil rights activities." *Id.* at 739. The agency was not

just undeterred by its wholesale violation of the targets' First Amendment rights; on the contrary, the exercise of such rights were cited as a justification for surveillance. James Bamford, *The Puzzle Palace: Inside the National Security Agency, America's Most Secret Intelligence Organization* 322 (1983).

To guard against the abuses identified by the Church Committee, Congress intervened and enacted the Foreign Intelligence Surveillance Act in 1978. *See* 95th Cong., Pub L. 95-511, 92 Stat. 1783 (1978). Congress intended FISA to put a stop to "the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 95-604 (I) (1976), at 7-8, *reprinted at* 1978 U.S.C.C.A.N. 3904, 3910; *see id* at 3908 ("This legislation is in large measure a response to the "revelations that warrantless electronic surveillance in the name of national security has been seriously abused"). Congress aimed to counter the "formidable" chilling effect that warrantless surveillance created for Americans' perceptions of themselves as potential targets of surveillance, and to encourage the American people to engage freely in First Amendment pursuits of "public activity" and "dissent from official policy." *Id.* This goal was made operational by Congress's determination that the FISA procedures, along with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, would be "*the exclusive* means by which electronic surveillance" may be conducted. 50 U.S.C. § 1812; 18 U.S.C. § 2511(2)(f); *see* 18 U.S.C. § 2510 *et seq.*[20] By announcing that petitioners

[20] Congress recognized that the TSP flouted the requirements of FISA and acted to prevent future circumvention. In the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110 261, 122 Stat. 2436 (2008), Congress reaffirmed, in no uncertain

fit the definition of those targeted under the NSA's warrantless surveillance program, stating that the Executive believes it has the right to target attorneys, and refusing to confirm or deny whether in fact these lawyers have been targeted, the NSA contravenes FISA's purpose and perpetuates the very fear that Congress hoped to end.[21]

Petitioners have good reason to fear the same constitutional violations have occurred once again. FOIA was designed to open government abuse to the light of day, and while other circuits have applied *Glomar* to permit the shielding of programs that are both secret and legitimate, there is no basis for refusing to admit or deny whether these lawyers have been caught in the NSA's publicly-acknowledged and patently illegal net of warrantless surveillance.

Threatening to engage in warrantless surveillance is of a piece with the Executive Branch's pattern of systematic interference with the Guantánamo detainees' constitutionally-based right of access to counsel. After

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terms, that FISA is the exclusive means for all electronic foreign intelligence surveillance activities. 2008 FISA Amendments §102(a). Notably, the 2008 FISA Amendments did not retroactively authorize the warrantless surveillance conducted under the TSP, and thus the amendments provide no defense to the NSA or DOJ in this case.

[21] President Truman created the NSA by secret directive in 1952 to engage in electronic surveillance during the Cold War. Church Committee Book III, at 736. Throughout most of the Cold War, the NSA operated without any statutory control; until 1992, it had no legislative charter, and, until 1981, no publicly available Executive Order defined its responsibilities or limited its power. Intelligence Authorization Act for Fiscal Year 1993, Pub. L. 102-496, 106 Stat. 3180, 3186 (1992); Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,947 § 1.12(b) (Dec. 4, 1981), *reprinted at* 50 U.S.C. § 401 *note*. The NSA could therefore engage in vast, sweeping, indiscriminate surveillance beyond that authorized for the regulated intelligence agencies. Book III, at 735.

this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), the Executive Branch proposed procedures sharply limiting detainees' access to counsel. Ultimately, the courts rejected the Executive's most aggressive positions, including the assertion that it could conduct warrantless audio and video monitoring of in-person meetings between habeas counsel and detainees. *See Al Odah v. United States*, 346 F. Supp. 2d 1, 8-9 (D.D.C. 2004); *see also Adem v. Bush*, 425 F. Supp. 2d 7, 11-12 (D.D.C. 2006) (mem. op.) ("The Government took the position that detainees' access to counsel existed solely at the pleasure of the Government, with restrictions to be imposed as it saw fit.") (citing *Al Odah*, 346 F. Supp. 2d at 3). Formal Executive efforts to limit detainees' access to counsel and courts were also supplemented by less visible, less formal means of undermining the availability and effectiveness of counsel.[22] As petitioners' legal ethics expert in the courts below, Professor David Luban, recounts, agency officials told lawyers that their clients did not wish to see them, while telling the clients that the lawyers were agency interrogators; agency officials punished detainees who sought access to counsel by leaving them in isolation for days on end, without bathroom facilities; agency investigators posed as attorneys; and agency officials told detainees that their lawyers were homosexual or Jewish (when neither was the case). *See* David Luban, *Lawfare and Legal Ethics in*

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[22] This approach even extended to a Defense Department effort to persuade corporate clients to boycott the law firms representing detainees. *See* Interview by Jane Norris with Charles Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in Washington, D.C. (Jan. 11, 2007), *audio available at* http://www.federalnewsradio.com/index.php?sid=1029698&nid=250 (last visited Mar. 30, 2010), *transcript of relevant portions available at* http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott.

Guantánamo, 60 Stan. L. Rev 1981 (2008). Threatening lawyers with warrantless surveillance appears to be part and parcel of these efforts.

Preserving meaningful access to the courts for the detainees depends on the confidentiality of their lawyers' communications in the course of investigating and analyzing their cases. *See Bounds v. Smith*, 430 U.S. 817, 822 (1977); *Hicks v. Bush*, 452 F. Supp. 2d 88, 99-100 (D.D.C. 2006). Allowing such executive limitations on the scope and effectiveness of the writ to go unremedied would raise "troubling separation-of-powers concerns," *Boumediene v. Bush*, 128 S. Ct. 2229, 2258 (2008), and undermine the right to judicial review in habeas that this Court found constitutionally mandated in *Boumediene*.

In the instant litigation, the executive has prevented judicial oversight of a program that, when applied to lawyers, would be illegal, unconstitutional, and corrosive of our adversary system of justice. This Court should not allow the government to hide behind *Glomar* to, yet again, prevent judicial review of a surveillance program the legality of which the government refuses to defend on the merits.

CONCLUSION

For the reasons set forth above, the Court should grant petitioners' petition for a writ of certiorari.

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